IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63818-1-I
Respondent,	)	DIVISION ONE
v.	)	
JOHN ALVIN FORD, III,	)	UNPUBLISHED
Appellant.	)	FILED: September 28, 2009

Cox, J. — There is no constitutional right to the admission of irrelevant evidence in defense of a criminal defendant.[1] Here, the evidence that the trial court excluded was not relevant. Because the trial court did not abuse its discretion in excluding this evidence and the statement of additional grounds for review is not meritorious, we affirm.

In 2006, J.J. lived with his mother, Genice Jones, and sister, J.J.F. His grandmother, Barbara Childs, lived in the same apartment complex. Childs and J.J. had a close relationship and saw each other often. During the summer of 2006, J.J. went to live with his father, John Ford. At that time J.J. was 9 years old.

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[1] State v. Maupin, 128 Wn.2d 918, 925, 913 P.2d 808 (1996) (citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

When J.J. returned to Jones' home at the beginning of September to start school, J.J.'s sister and aunt noticed bruises and marks on the back of his legs while he was trying on school clothes. J.J. told them that Ford had "whopped" him. The next day, Childs took J.J. to Saint Clare Hospital where he was examined and then interviewed by a social worker. Childs subsequently made a police report and an officer came to her home and interviewed Childs and J.J. He was later taken to Mary Bridge Children's Hospital where child forensic interviewer Dr. Yolanda Duralde interviewed him. Dr. Duralde recorded "loop scars on J.J's back and on both thighs anteriorly and posteriorly." She noted that a few of the lesions on his legs were still healing and that there was a large wound on his upper arm that was still healing.

J.J. related the same story to his grandmother, the various interviewers, and the court. First, J.J. lost Ford's wallet and Ford hit him with a belt. Second, Ford caught J.J. listening to music by a female singer that he did not approve of and hit J.J. with the radio's electrical cord. According to J.J., both of these incidents happened toward the end of August.

The State charged Ford with one count of assault of a child in the first degree with three alternative means of commission and two aggravating factors. Ford pled not guilty to all charges. The jury convicted Ford of the lesser included crime of assault of a child in the second degree with two aggravating factors. The court imposed an exceptional sentence of 65 months in confinement and 18 to 36 months in community custody.

Ford appeals.

EXCLUSION OF EVIDENCE

Ford argues that the trial court violated his constitutional right to present a defense by excluding Child Protective Services (CPS) records, testimony of J.J.'s sister regarding the CPS records, J.J.'s testimony regarding whether his grandmother had ever punished him for lying, and the testimony of Jeanette Williams. We disagree.

There is no constitutional right to the admission of irrelevant evidence in defense of a criminal defendant.[2] Evidence is admissible if it is relevant unless, under ER 403, its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[3] Evidence is relevant under ER 401 if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence.[4]

The trial court's decision regarding the admission or exclusion of evidence will not be reversed absent an abuse of discretion.[5] A trial court abuses its discretion if its decision is manifestly unreasonable or based on

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[2] Maupin, 128 Wn.2d at 925 (citing Hudlow, 99 Wn.2d at 15).

[3] ER 403.

[4] ER 401; State v. Thomas, 150 Wn.2d 821, 858, 83 P.3d 970 (2004).

[5] State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006); State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

untenable grounds or untenable reasons.[6] A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.[7] A decision is based on untenable grounds if the factual findings are unsupported by the record.[8] A decision is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard.[9]

CPS Records and Related Testimony

Prior to trial, Ford and the State both moved in limine regarding the admissibility of CPS records involving Jones and J.J.F. and J.J.F.'s testimony regarding the underlying facts of the CPS investigation. The trial court granted the State's motion to exclude (and denied Ford's motion to allow) the evidence on the grounds that it was remote as to time and people and therefore not relevant. Ford argues that this decision violated his right to present a defense. We disagree.

The CPS records at issue disclose that in 2000 Jones whipped J.J.F. with an electrical cord. J.J.F.'s testimony would have corroborated this report. Ford argued that the report and testimony of Jones' prior bad acts were relevant as exculpatory evidence suggesting that J.J. lied and that Jones rather than Ford

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[6] In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

[7] Id.

[8] Id.

[9] Id.

was responsible for the abuse. He argued that because Jones had previously whipped J.J.F. with an electrical cord, she had a history and pattern of using an electrical cord to discipline her children that constitutes a "nexus" to the charged crime.

The State responded with two arguments. First, the State argued that the evidence was remote and unconnected to the allegations in this case. It also argued that Ford did not lay a sufficient foundation connecting Jones to the crime to allow the evidence as "other suspect evidence."

The trial court's decision that the evidence was remote as to time and people was within the range of reasonable choices and not an abuse of discretion. First, the trial court has discretion to determine over what time limits evidence may range.[10] Here, the CPS records and J.J.F.'s testimony relate to an incident that occurred at least four years prior to the alleged abuse in this case. Second, the incident in question involved J.J.'s mother and sister, not J.J. or Ford. For these reasons, the court's determination that this evidence was too remote as to time and people to be relevant was not an abuse of discretion.

Ford argues that the evidence was relevant as "other suspect evidence." This argument is unconvincing and we reject it.

Where a defendant seeks to introduce evidence linking another person to the crime charged, such evidence must be relevant. The test for determining if evidence is relevant in this situation is whether the evidence creates "a trail of

[10] State v. Sammons, 47 Wn. App. 762, 766, 737 P.2d 684 (1987).

facts or circumstances that clearly point to someone other than the defendant as the guilty party."[11] The defendant has the burden of demonstrating a nexus between the other suspect and the crime that makes the evidence admissible.[12] Evidence suggesting only that the other party had the motive, ability, or opportunity to commit the crime is not sufficient.[13]

Here, the suggested nexus connecting Jones to the crime is the fact that she had used a similar form of corporeal punishment to discipline J.J.F. more than five years prior to the charged abuse and the fact that she ***may*** have had an opportunity to punish J.J. at some point in August while he was at her home getting clothes. While these facts undeniably provide fodder for speculation, it was well within the trial court's discretion to find that these were not "a trail of facts or circumstances that clearly point" to Jones as the guilty party. Exclusion of the CPS records was proper.

The proffered testimony of J.J.F. is subject to the same analysis. She would have been called to corroborate the information in the CPS files that we discussed above. For the same reasons, the court's ruling excluding that evidence was not an abuse of discretion.

J.J.'s Testimony

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[11] State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008); Maupin, 128 Wn.2d at 928.

[12] State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993); State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

[13] State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993).

During direct examination of J.J. defense counsel asked, "Has your Grandma ever punished you?" The State objected on relevancy grounds and the trial court sustained the objection. Ford argues that this was an abuse of the trial court's discretion. We again disagree.

Ford argues that the trial court abused its discretion by excluding J.J.'s testimony because the testimony was relevant to J.J.'s credibility. J.J.'s grandmother, Barbara Childs, had previously testified that she or Jones would spank J.J. with a belt if he told a lie. Defense counsel argued that the question would therefore test J.J.'s credibility.

The State responded that the question was irrelevant. J.J. had not previously testified one way or the other regarding whether Childs had ever punished him for lying and therefore the question had no impeachment value.

Ford does not offer further support for the assertion that this one question would have cast doubt upon J.J.'s credibility. Thus, the trial court's decision to exclude the question as irrelevant was reasonable. There was no abuse of discretion.

Jeanette Williams' Testimony

On the second to last day of trial, defense counsel made an offer of proof to admit the testimony of a newly discovered witness named Jeanette Williams. The trial court did not allow the testimony, finding that the offer of proof was collateral, irrelevant, and remote. Ford argues that this was an abuse of the trial court's discretion. We hold that it was not.

Defense counsel stated that Williams would testify that she had noticed marks and scars on J.J. going back to 2000 and that she helped Ford call CPS about scars she noticed on J.J. in June 2006. Ford argues that this would have supported his defense that he made several attempts to report J.J.'s injuries to CPS.

The State, on the other hand, stated that Williams said that she had not seen J.J. between 2003 and June 2007 and that she had never reported any of the marks she saw because they were not fresh. The State argued that any reports to CPS for either J.J. or J.J.F. prior to the alleged abuse in August 2006 were remote and irrelevant as to the allegations of abuse in August 2006. We agree.

Based upon that fact that Williams did not have any information related to the alleged 2006 abuse, the trial court's decision not to allow her to testify was reasonable. There was no abuse of discretion.

CUMULATIVE ERROR

Ford argues that his conviction should be overturned because cumulative evidentiary errors by the trial court violated his constitutional right to a fair trial. We disagree.

The cumulative error doctrine applies where several trial errors occur which, standing alone, may not be sufficient to justify reversal but when combined may deny the defendant a fair trial.[14] Here, the trial court did not err.

[14] State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Therefore the doctrine is not applicable.

ADDITIONAL GROUNDS FOR REVIEW

Ford argues two additional grounds for review. First, he argues that his conviction violates double jeopardy because the trial court used two aggravating factors to support an enhanced sentence when those same two aggravating factors were already elements of the underlying charge of assault of a child in the first degree. We hold that there was no double jeopardy violation here.

The United States Constitution provides that a person may not "be subject for the same offense to be twice put in jeopardy of life or limb."[15] Similarly, the Washington State constitution provides that a person may not be twice put in jeopardy for the same offense.[16] Thus, under the "same evidence test"[17] a defendant may not be convicted for two statutory offenses if the offenses are identical in law and fact. Ford has the burden of proving the facts necessary to establish his claim of double jeopardy.[18]

Here, Ford has not demonstrated that he has been convicted of two

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[15] U.S. Const. amend. V.

[16] Wash. Const. art. I, § 9.

[17] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004).

[18] State v. Hite, 3 Wn. App. 9, 11, 472 P.2d 600, review denied, 78 Wn.2d 995 (1970), cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971) (holding that "one who asserts the bar of double jeopardy . . . must affirmatively establish (1) that he has previously been placed on trial for the same offense and (2) that the court of the former trial was one of competent jurisdiction to hear and determine the merits of the cause") (citations omitted).

separate offenses that are identical in law and fact. Rather he was convicted of the single crime of abuse of a child in the second degree with two aggravating factors. The fact that the two aggravating factors may resemble some of the elements of abuse of a child in the first degree is irrelevant.

Second, Ford argues that his sentence is invalid because the total term of confinement (65 months) exceeds the statutory maximum. Ford is mistaken.

His sentence exceeds the standard sentencing range (which is 41 to 54 months) but it does not exceed the statutory maximum for the crime of assault of a child in the second degree (which is 120 months).[19] A sentencing court may deviate from the standard sentencing range if a jury finds that there are "substantial and compelling reasons to justify an exceptional sentence."[20] Here, the jury found that two aggravating factors were proved beyond a reasonable doubt. This is a substantial and compelling reason to justify an exceptional sentence above the standard range, and Ford does not argue otherwise.

We affirm the judgment and sentence.

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[19] RCW 9A.20.020(1)(b) ("Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following: . . . For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine.").

[20] RCW 9.94A.535, 537.

Cox, J.

WE CONCUR: